



# **Policy Monitoring Review of Parker County's Indigent Defense Systems**

**January 2022**



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**Mission:** Protecting the right to counsel, improving public defense

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## Executive Summary

The Texas Indigent Defense Commission (TIDC) monitors local compliance with the Fair Defense Act through policy reviews.<sup>1</sup> TIDC observed court, interviewed officials, and reviewed FY2019 data from Parker County. TIDC made seven findings of noncompliance, including the following:

At Article 15.17 hearings, if magistrates expect defendants to make bail, magistrates do not always ask defendants if they want to request counsel (Finding 1). When defendants request counsel at Article 15.17 hearings, magistrates have a duty to ensure assistance in completing financial forms is provided at the time of the hearing. This assistance is not always provided at that time, and as a result, courts do not always receive requests for counsel (Finding 2).

Article 26.04 of the Code of Criminal Procedure requires the felony, misdemeanor, and juvenile courts to create a public appointment list containing the names of attorneys who have applied to the list, to require attorneys on the list meet the objective qualifications set by the judges, and to approve this list by a majority the judges. In Parker County, however, each court has its own appointment list (Findings 3 and 4).

From TIDC's sample case file review, the timeliness of felony and misdemeanor appointments fell below TIDC's threshold for presuming a jurisdiction has procedures in place that assure timely appointment of counsel (Findings 5 and 6). In misdemeanor cases, some requests for counsel were not ruled upon, and defendants entered uncounseled pleas (Finding 7).

TIDC thanks Parker County officials and staff for their assistance in completing this review. TIDC staff stand ready to provide technical and financial assistance to remedy these issues. TIDC will conduct a follow-up review regarding its finding within two years.<sup>2</sup>

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<sup>1</sup> TEX. GOV'T CODE § 79.037(a)–(b).

<sup>2</sup> 1 TEX. ADMIN. CODE § 174.28(c)(2).

## **Background**

TIDC selected Parker County for a review through its annual county selection process, which seeks to cycle through counties around the state. This review, the first for Parker County, covered all six core requirements of the Fair Defense Act:<sup>3</sup>

**REQUIREMENT 1: CONDUCT PROMPT AND ACCURATE ARTICLE 15.17 PROCEEDINGS**

**REQUIREMENT 2: DETERMINE INDIGENCE ACCORDING TO STANDARDS DIRECTED BY THE INDIGENT DEFENSE PLAN**

**REQUIREMENT 3: ESTABLISH MINIMUM ATTORNEY QUALIFICATIONS**

**REQUIREMENT 4: APPOINT COUNSEL PROMPTLY**

**REQUIREMENT 5: INSTITUTE A FAIR, NEUTRAL, AND NONDISCRIMINATORY ATTORNEY SELECTION PROCESS**

**REQUIREMENT 6: REPORT DATA REQUIRED BY STATUTE**

TIDC staff members Wesley Shackelford, Lindsay Bellinger, Claire Buetow, and Joel Lieurance conducted the review. TIDC examined FY2019 data, including misdemeanor and felony case files; summary records examined by juvenile probation; the local indigent defense plan; appointment lists; and records of attorney continuing legal education (CLE) hours. TIDC interviewed judges, County staff, and local criminal defense attorneys. TIDC observed Article 15.17 hearings, felony dockets, and misdemeanor dockets.

## **Program Assessment**

### **REQUIREMENT 1: CONDUCT PROMPT AND ACCURATE ARTICLE 15.17 PROCEEDINGS**

Under Article 15.17 of the Code of Criminal Procedure, an arrested person must be brought before a magistrate within 48 hours.<sup>4</sup> At this hearing, the magistrate must inform the person of the right to counsel, inform the person of the procedures for requesting counsel, and ensure the person has reasonable assistance in completing the necessary forms for requesting counsel.<sup>5</sup> Magistrates must transmit requests for counsel to the appointing authority within 24 hours.<sup>6</sup> If a person is arrested on an out-of-county

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<sup>3</sup> 1 TEX. ADMIN. CODE § 174.28.

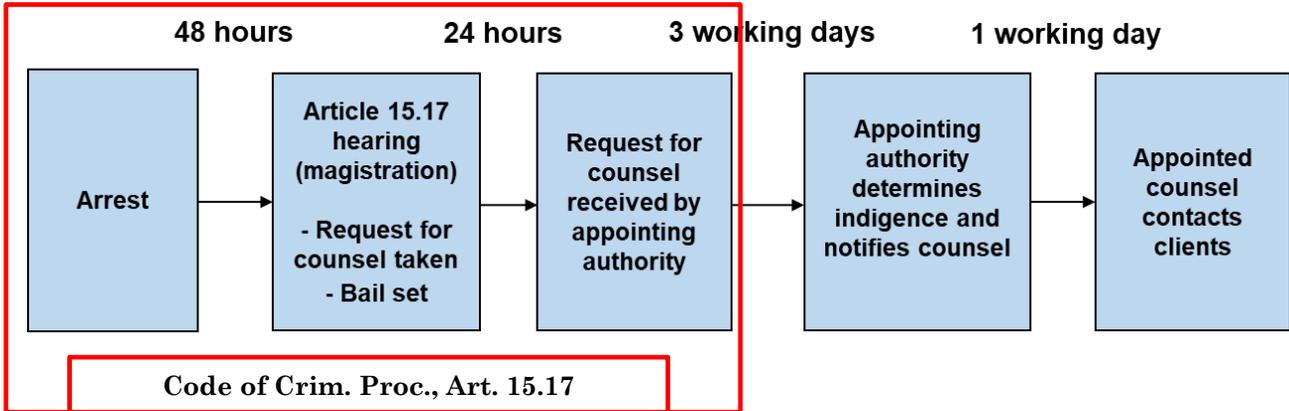
<sup>4</sup> TEX. CODE CRIM. PROC. ART. 15.17(a).

<sup>5</sup> TEX. CODE CRIM. PROC. ART. 15.17(a).

<sup>6</sup> TEX. CODE CRIM. PROC. ART. 15.17(a).

warrant, the magistrate must perform the same duties as if the person were arrested on an in-county warrant.<sup>7</sup>

**Figure 1a: Timeline for Appointment of Counsel in Adult Criminal Cases**



*Local Practices for Conducting Magistrate Warnings*

In Parker County, defendants who are in jail are promptly brought before a magistrate. The magistrate makes probable cause determinations, sets bail, and explains that defendants have a right to counsel. Magistrates then explain that, if a defendant makes bail, the defendant will have to request counsel when brought before the trial court. If a defendant does not expect to make bail, the defendant can request counsel. Defendants who expect to make bail are not always given an opportunity to request counsel. After the magistrate warnings, jail staff provide affidavits of indigence to persons who request counsel. The Parker County Sheriff’s Office sends completed financial paperwork by courier to each trial court daily.<sup>8</sup>

**1.a. Timeliness of Warnings**

An arrested person must be brought before a magistrate within 48 hours of arrest.<sup>9</sup> TIDC presumes a county is in substantial compliance with the prompt magistration requirement if at least 98% of Article 15.17 hearings are conducted within 48 hours.<sup>10</sup> To determine the timeliness of Article 15.17 warnings in the County, TIDC staff examined 198 sample case files in which staff could determine the time from arrest until the Article 15.17 hearing.<sup>11</sup> All sample cases had Article 15.17 hearings occurring

<sup>7</sup> TEX. CODE CRIM. PROC. ART. 15.18(a). A list of contacts to send out-of-county requests is available at: <http://tfdc.tamu.edu/public.net/Reports/OutOfCountyArrestContacts.aspx>.

<sup>8</sup> Prior to case filing, the Sheriff’s Office can determine the trial court based on the offense level and the defendant’s last name.

<sup>9</sup> TEX. CODE CRIM. PROC. ART. 15.17(a).

<sup>10</sup> 1 TEX. ADMIN. CODE § 174.28(c)(1). Article 15.17(a) requires magistrate warnings occur within 48 hours of arrest. To simplify time measurement, TIDC assumes warnings are timely if they occur within 2 days of arrest.

<sup>11</sup> TIDC excluded cases in which it could not determine the timeliness of magistrate warnings.

within two days of arrest, indicating the County is providing warnings in a timely manner. (See Table 1.)

**Table 1: Timeliness of Article 15.17 Hearings**

	Sample Size	Percent
Article 15.17 hearing occurs x days after arrest:	198	
0 days	82	41%
1 day	108	55%
2 days	8	4%
<b>Timely Hearings</b>	<b>198</b>	<b>100%</b>
More than 2 days	0	0%

***1.b. Ability of Arrested Persons to Request Counsel***

At the Article 15.17 hearing, the magistrate must inform an arrested person of the right to counsel, ask whether the person wants to request counsel, and record whether the person requests counsel.<sup>12</sup> According to reports submitted by justice courts and municipal courts to the Office of Court Administration (OCA), about 31% of misdemeanor defendants requested counsel and 46% of felony defendants requested counsel in FY2019.

Based on TIDC’s interviews and observations, defendants who expect to make bail cannot always request counsel at the Article 15.17 hearing. For instance, in a hearing observed by TIDC, the judge asked a defendant, “Do you want to apply for an appointed attorney, or do you plan to bond out?” Article 15.17(e) of the Code of Criminal Procedure requires the court to ask and record whether each defendant requests counsel, regardless of whether the defendant expects to make bail. Magistrates must ask each defendant charged with aailable offense whether the person would like to request appointed counsel and record the response.

***1.c. Reasonable Assistance in Completing Forms for Requesting Counsel***

At the Article 15.17 hearing, a magistrate must ensure the arrested person has reasonable assistance in completing the necessary forms for requesting counsel at the time of the hearing.<sup>13</sup> Jail staff assist arrestees in completing affidavits of indigence. From TIDC’s file review, requests made at the Article 15.17 hearing were not always ruled upon by the appointing authority. This is an indication that affidavits are not always completed for defendants who request counsel at the Article 15.17 hearing. The County must provide a method to ensure reasonable assistance in completing affidavits of indigence is provided at the time of the Article 15.17 hearing.

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<sup>12</sup> TEX. CODE CRIM. PROC. ART. 15.17(a), (e).

<sup>13</sup> TEX. CODE CRIM. PROC. ART. 15.17(a).

***1.d. Transmitting Forms to the Appointing Authority***

Within 24 hours of a person requesting counsel, the magistrate must transmit the request to the entity authorized to appoint counsel.<sup>14</sup> For persons arrested on out-of-county warrants, the magistrate must transmit the request to the warrant-issuing county.<sup>15</sup> In Parker County, couriers deliver completed affidavits from the jail to the trial court daily.

**FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 1**

**Conduct prompt and accurate magistration proceedings**

**FINDING 1:** Article 15.17(e) of the Code of Criminal Procedure requires the court to ask and record whether each defendant requests counsel, regardless of whether the defendant expects to make bail. Magistrates must ask each defendant charged with aailable offense whether the person would like to request appointed counsel and record the response.

**FINDING 2:** At the Article 15.17 hearing, a magistrate must ensure the arrested person has reasonable assistance in completing the necessary forms for requesting counsel at the time of the hearing. The County must provide a method to ensure reasonable assistance in completing affidavits of indigence is provided at the time of the Article 15.17 hearing.

**REQUIREMENT 2: DETERMINE INDIGENCE ACCORDING TO STANDARDS DIRECTED BY THE INDIGENT DEFENSE PLAN**

Under Article 26.04(l) of the Code of Criminal Procedure, counties must adopt procedures and financial standards for determining whether a defendant is indigent. Article 26.04(m) lists the factors courts may consider in determining indigence:

In determining whether a defendant is indigent, the court or the courts' designee may consider the defendant's income, source of income, assets, property owned, outstanding obligations, necessary expenses, the number and ages of dependents, and spousal income that is available to the defendant. The court or the courts' designee may not consider whether the defendant has posted or is capable of posting bail, except to the extent that it reflects the defendant's financial circumstances as measured by the considerations listed in this subsection.

The local standards for determining indigence are set in each county's indigent defense plans. The statutory test for indigence is whether the defendant is financially able to

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<sup>14</sup> TEX. CODE CRIM. PROC. ART. 15.17(a).

<sup>15</sup> TEX. CODE CRIM. PROC. ART. 15.18 (a-1).

employ counsel.<sup>16</sup> Some defendants may not qualify as indigent under the local standard set in the plan, but still not have the financial ability to employ counsel.

### ***2.a. Indigence Standard in Adult Criminal Cases***

For adult criminal cases in Parker County, a person is presumed indigent if:

1. The person is eligible to receive food stamps, Medicaid, Temporary Assistance for Needy Families, Supplemental Security Income, or public housing;
2. The person has a household income at or below 100% of the Federal Poverty Guidelines; or
3. The person is currently serving a sentence in a correctional institution, is currently residing in a public mental health facility, or is subject to a proceeding in which admission or commitment to such a mental health facility is sought.<sup>17</sup>

The posting of bail or ability to post bail may not be considered in determining whether the person is indigent.

### ***2.b. Indigence Standard in Juvenile Cases***

For juvenile cases in Parker County, a youth is presumed indigent if:

1. The person responsible for the youth is eligible to receive food stamps, Medicaid, Temporary Assistance for Needy Families, Supplemental Security Income, or public housing.
2. The net household income of the person responsible for the youth does not exceed 125% of the Federal Poverty Guidelines; or
3. The person responsible for the youth is currently serving a sentence in a correctional institution, is currently residing in a public mental health facility, or is subject to a proceeding in which admission or commitment to such a mental health facility is sought.

### ***2.c. Local Practices***

Based on case file examination, the courts appeared to follow the local standard of indigence.<sup>18</sup> TIDC finds that Parker County is in substantial compliance with Requirement 2 for both adult and juvenile cases.

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<sup>16</sup> TEX. CODE CRIM. PROC. ART. 1.051(b).

<sup>17</sup> The Parker County Felony Indigent Defense Plan is available at <http://tidc.tamu.edu/IDPlan/ViewPlan.aspx?PlanID=390>. The Parker County Misdemeanor Indigent Defense Plan is available at <http://tidc.tamu.edu/IDPlan/ViewPlan.aspx?PlanID=443>. Both plans use the same indigence standard.

<sup>18</sup> The courts denied indigence in 5% of sample felony cases, 1% of sample misdemeanor cases, and 0% of sample juvenile cases. TIDC's case file review did not reveal any notes denying indigence for improper reasons.

FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 2

**Determination of Indigence**

Requirement satisfied. No findings.

**REQUIREMENT 3: ESTABLISH MINIMUM ATTORNEY QUALIFICATIONS**

Under Article 26.04(d) of the Code of Criminal Procedure, private attorneys wishing to take court appointments must apply to be on an appointment list. The list must contain objective qualifications, including a minimum annual continuing legal education (CLE) requirement of at least six hours per year in criminal or juvenile law.<sup>19</sup> Assigned counsel attorneys must be approved by a majority of judges presiding over criminal and juvenile matters.<sup>20</sup>

***3.a. Felony and Misdemeanor Cases***

For both the felony and misdemeanor appointment lists, attorneys must obtain at least six criminal CLE hours annually or be board certified in criminal law. To be approved for the lists, attorneys must have represented defendants in at least ten misdemeanor trials or five felony trials, half of which must have been jury trials. Additionally, attorneys must maintain an office in Parker County. Each court has its own appointment list.

***3.b. Juvenile Cases***

The juvenile courts require all attorneys to obtain at least six juvenile CLE hours annually or be board certified in juvenile law. Each court has its own appointment list.

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<sup>19</sup> 1 TEX. ADMIN. CODE §§ 174.1–4. Attorneys may be Board Certified in criminal or juvenile law in lieu of the annual CLE requirement.

<sup>20</sup> TEX. CODE CRIM. PROC. ART. 26.04(d).

**Table 2: Qualifications for Parker County Appointment Lists**

<b>List</b>	<b>CLE Hours</b>	<b># Years Experience</b>	<b># of Jury Trials or # of App. Briefs</b>
Felony	6 criminal	n/a	10 misd. trials or 5 felony trials; ½ before jury
Misdemeanor	6 criminal	n/a	10 misd. trials or 5 felony trials; ½ before jury
Appeals	6 criminal	n/a	Participated in at least 3 appeals
Juvenile - CINS	6 juvenile	1 year in juvenile law	Observed or participated in: a. 3 stipulated juv. adjudications; b. 1 contested juvenile adjudication; c. 3 juvenile dispositions; 1 detention hearing; and participated in at least 3 criminal or juvenile trials.
Juvenile – Delinquent Conduct	6 juvenile	2 years in juvenile law	Participated in at least 10 criminal or juv. trials
Juvenile – Determinate Sentence Proceedings / Certification as Adult	6 juvenile	3 years in juvenile law	Participated in at least 20 criminal or juv. trials

***Assessment***

TIDC reviewed appointment lists and CLE records, and found that the County has procedures for managing appointment lists and for ensuring that all attorneys on the lists meet their annual CLE requirement. However, each court has its own appointment list.

Article 26.04(e)(2) of the Code of Criminal Procedure requires the district court judges in a county to establish a public appointment list. Article 26.04(e)(1) requires the statutory county courts to do the same. Article 26.04(d) requires a majority of the judges who established the public appointment list to approve attorneys for the list.<sup>21</sup> The district courts must establish felony and juvenile public appointment lists in which each attorney is approved by a majority of the judges. The statutory county courts must establish a misdemeanor appointment list in which each attorney is approved by a majority of the judges.

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<sup>21</sup> Article 26.04(d) states:

(d) A public appointment list from which an attorney is appointed as required by Subsection (a) shall contain the names of qualified attorneys, each of whom:

- (1) applies to be included on the list;
- (2) meets the objective qualifications specified by the judges under Subsection (e);
- (3) meets any applicable qualifications specified by the Texas Indigent Defense Commission; and
- (4) is approved by a majority of the judges who established the appointment list under Subsection (e).

## FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 3

### **Establish Minimum Attorney Qualifications**

**FINDING 3 (FELONY AND JUVENILE CASES):** Article 26.04(d) of the Code of Criminal Procedure requires a majority of the judges who established the public appointment list to approve attorneys for the list. The district courts must establish felony and juvenile public appointment lists in which each attorney is approved by a majority of the judges.

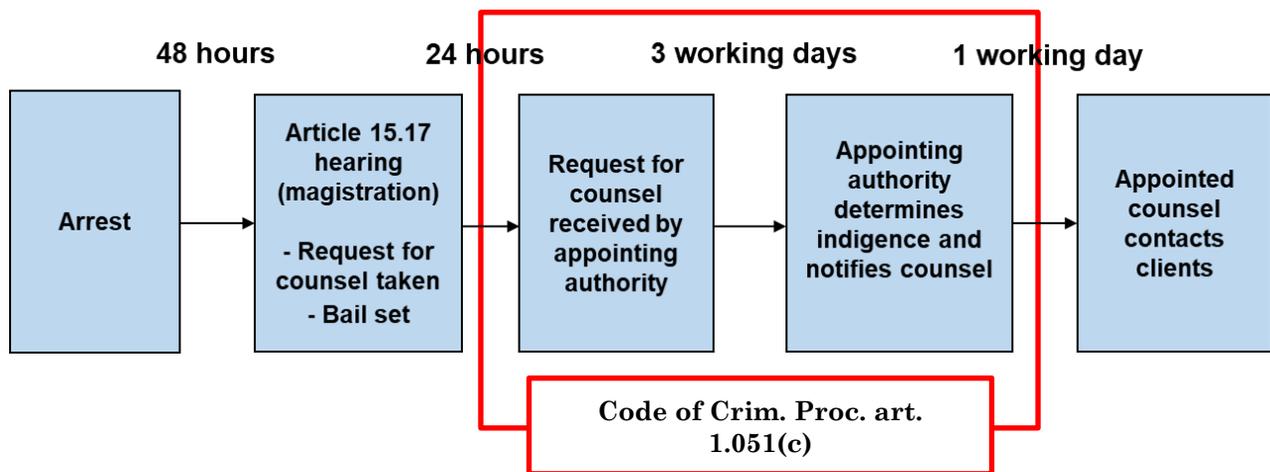
**FINDING 4 (MISDEMEANOR CASES):** Article 26.04(d) of the Code of Criminal Procedure requires a majority of the judges who established the public appointment list to approve attorneys for the list. The statutory county courts must establish a misdemeanor appointment list in which each attorney is approved by a majority of the judges.

## **REQUIREMENT 4: APPOINT COUNSEL PROMPTLY**

### *Adult Cases*

Under Article 1.051(c) of the Code of Criminal Procedure, courts in counties with a population under 250,000 must rule on a request for counsel within three working days of receiving the request.

**Figure 1b: Timeline for Appointment of Counsel in Adult Criminal Cases**



Under Article 15.17 and local procedures, the first opportunity for most defendants to request counsel is at the Article 15.17 hearing, when a defendant appears before a magistrate and is informed of the charges against him or her. If a defendant makes bail before the Article 15.17 hearing (or is never brought before a magistrate), the defendant has his or her first opportunity to request counsel at the initial appearance in the trial court.

To assess the timeliness of local appointment procedures, TIDC examines case files and measures the time from counsel request until appointment of counsel or denial of indigence. TIDC examined cases filed in FY2019 (October 2018 to September 2019).

**4.a. Timeliness of Appointment in Felony Cases**

TIDC examined 95 sample felony cases filed in FY2019.<sup>22</sup> The courts made timely appointments of counsel in 28 of 79 cases in which counsel was requested (**35% timely**). This falls below TIDC’s 90% threshold for presuming a jurisdiction’s practices ensure timely appointment of counsel. The County must implement practices that satisfy Article 1.051(c)(1)’s timeline in felony cases.

**Table 3: Times to Appointment in Felony Cases**

	Sample Size	Number from sample	Percent
Number of case files examined in which TIDC could match magistrate warning forms	95		
Total cases with a counsel request		79	
<b>Appointment / denial of indigence occurred in:</b>			
0 work days		12	
1 – 3 work days + 24 hour transfer		16	
<b>Total timely appointments / denials</b>		<b>28</b>	<b>35%</b>
4 - 5 work days + 24 hour transfer		6	
More than 5 work days + 24 hour transfer		37	
No ruling on request		8	
Total untimely appointments / denials		51	65%

**4.b. Timeliness of Appointments in Misdemeanor Cases**

TIDC examined 111 sample misdemeanor cases filed in FY2019.<sup>23</sup> The courts made timely appointments of counsel in 21 of 57 cases in which counsel was requested (**37% timely**). This falls below TIDC’s 90% threshold for presuming a jurisdiction’s practices ensure timely appointment of counsel. The County must implement practices that satisfy Article 1.051(c)(1)’s timeline in misdemeanor cases.

<sup>22</sup> TIDC examined 169 felony case files, but excluded cases in which it could not find magistrate warning forms.

<sup>23</sup> TIDC examined 204 misdemeanor case files, but excluded cases in which it could not find magistrate warning forms.

**Table 4: Times to Appointment in Misdemeanor Cases**

	Sample Size	Number from sample	Percent
Number of case files examined in which TIDC could match magistrate warning forms	111		
Total cases with a counsel request		57	
<b>Appointment / denial of indigence occurred in:</b>			
0 work days		18	
1 – 3 work days + 24 hour transfer		3	
<b>Total timely appointments / denials</b>		<b>21</b>	<b>37%</b>
4 - 6 work days + 24 hour transfer		1	
More than 6 work days + 24 hour transfer		22	
No ruling on request		13	
Total untimely appointments / denials		36	63%

*Waivers of Counsel in Misdemeanor Cases*

Article 1.051 of the Code of Criminal Procedure addresses waivers of counsel and allows waivers that are voluntarily and intelligently made. Under Article 1.051(f-1), the prosecutor may not initiate a waiver and may not communicate with a defendant until any pending request for counsel is denied, and the defendant waives the opportunity to retain private counsel. Under Article 1.051(f-2), the court must explain the procedures for requesting counsel to an unrepresented defendant and must give the defendant a reasonable opportunity to request counsel before encouraging the defendant to communicate with the attorney representing the state. If a defendant enters an uncounseled plea, the defendant must sign a written waiver, the language of which must substantially conform to the language of Article 1.051(g).

TIDC found two sample cases in which misdemeanor defendants requested counsel at the Article 15.17 hearing and later entered uncounseled pleas without their requests being ruled upon.<sup>24</sup> In both instances, defendants made bail shortly after requesting counsel. The absence of a ruling on a pending request raises the possibility of several statutory violations, including untimeliness (Art. 1.051(c)) and invalid waiver of counsel (Art. 1.051(f-2)). Parker County must ensure that its procedures for ruling on counsel requests meet the requirements of both Article 1.051(c) and 1.051(f-2).

**4.d. Juvenile Cases**

Counsel must be appointed for youths alleged to have engaged in delinquent conduct when the youth is brought to a detention hearing and when the youth is served

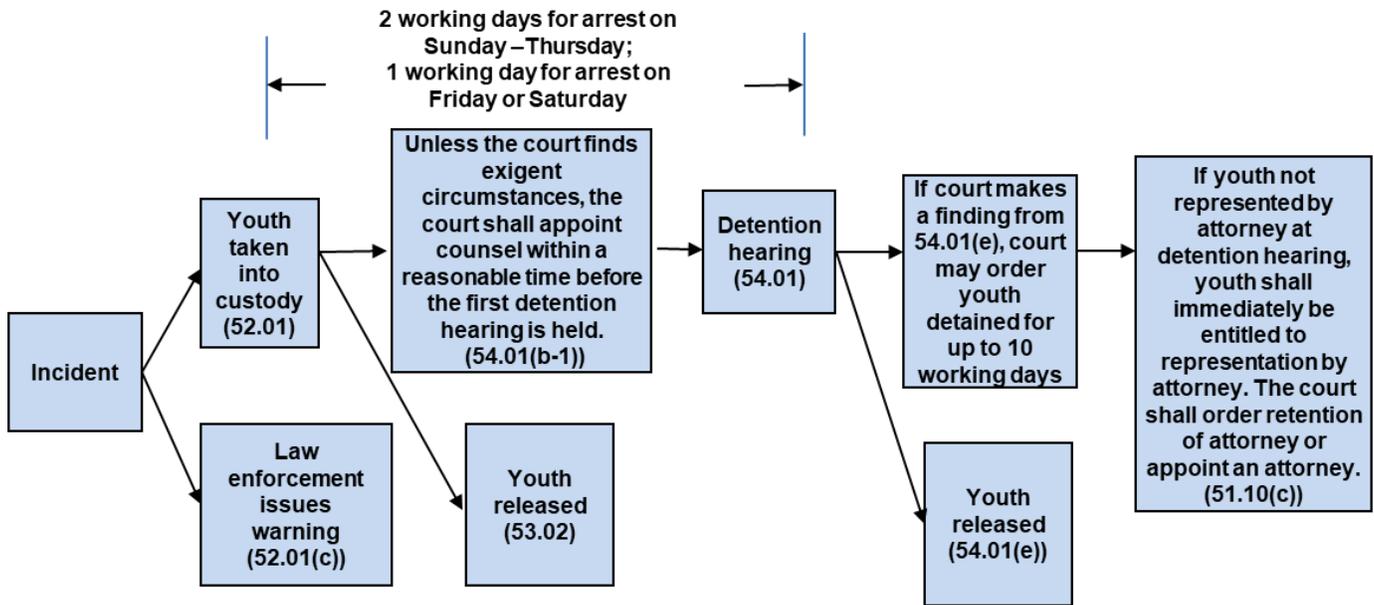
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<sup>24</sup> One of these cases was a dismissal in which the defendant made in exchange for a plea in another case.

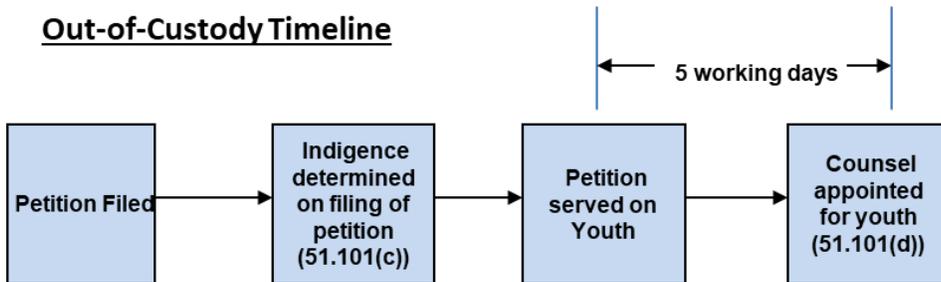
with a copy of the petition alleging misconduct.<sup>25</sup> Under Section 54.01(b-1) of the Family Code, unless the court finds the appointment of counsel is not feasible due to exigent circumstances, the court shall appoint counsel within a reasonable time before the first detention hearing. Under Subsections 51.101(c) and (d) of the Family Code, once a petition is served on the youth, the court has five working days to appoint counsel or order the retention of counsel for the youth.<sup>26</sup>

**Figure 2: Timeline for Appointment of Counsel in Juvenile Cases**

**In-Custody Timeline**



**Out-of-Custody Timeline**



<sup>25</sup> TEX. FAM. CODE § 51.10(f).

<sup>26</sup> If the person responsible for the youth fails to retain counsel, under Section 51.10(b) of the Family Code, the youth’s right to representation by an attorney shall not be waived in

- (1) a hearing to consider transfer to criminal court as required by Section 54.02;
- (2) an adjudication hearing as required by Section 54.03;
- (3) a disposition hearing as required by Section 54.04;
- (4) a hearing prior to commitment to the Texas Juvenile Justice Department as a modified disposition in accordance with Section 54.05(f); or
- (5) hearings required by Chapter 55.

Under Section 51.10(e), the court may appoint counsel and order the person responsible for the youth to pay a reasonable attorney’s fee set by the court.

*Juvenile Detention Hearings*

To assess the timeliness of the County’s appointment procedures in juvenile cases, Parker County staff examined 25 cases filed in FY2019 (October 2018 – September 2019). Section 54.01(b-1) of the Family Code requires counsel be appointed prior to the initial detention hearing, unless appointment is not feasible due to exigent circumstances.<sup>27</sup> Of the 25 sample cases, 7 involved detention hearings. Counsel was present for the initial detention hearing in all 7 cases (**100% timely**), which exceeds TIDC’s 90% threshold.

*Appointment After Service of the Petition*

Under Subsections 51.101(c) and (d) of the Family Code, once a petition is served on the youth, the court has five working days to appoint counsel or order the retention of counsel for the youth. Of 25 sample cases, 20 involved service of the petition on the youth. Counsel was timely appointed for 19 of these cases (**95% timely**), which exceeds TIDC’s 90% threshold.

**Table 5: Times to Appointment in Juvenile Cases**

	Sample Size	Number from Sample	Percent
Total juvenile cases examined	25		
<b>TIMELINESS OF COUNSEL APPOINTMENTS FOR DETENTION HEARINGS</b>			
Case files with detention hearings		7	
<b>Cases with attorney present at initial hearing</b>		<b>7</b>	<b>100%</b>
<b>TIMELINESS OF COUNSEL APPOINTMENTS WHERE YOUTH SERVED WITH A PETITION</b>			
Case files in which youth served with a petition	20		
Counsel appointed within 5 working days of service		18	
Indigence denied or counsel retained within 5 working days of service <sup>28</sup>		1	
<b>Total cases with timely presence of counsel</b>		<b>19</b>	<b>95%</b>
Cases where counsel not present in a timely fashion		1	5%

<sup>27</sup> TEX. FAM. CODE §54.01(b-1) states:

Unless the court finds that the appointment of counsel is not feasible due to exigent circumstances, the court shall appoint counsel within a reasonable time before the first detention hearing is held to represent the child at that hearing.

<sup>28</sup> TIDC considered a denial of indigence to be synonymous with an order to retain counsel.

## RECOMMENDATION FOR REQUIREMENT 4

### **Appoint Counsel Promptly**

**FINDING 5 (FELONY CASES):** Parker County's felony appointment process did not meet TIDC's threshold for timely appointment of counsel (90% timely). Under Article 1.051(c)(2), district courts must rule on all requests for counsel within three working days. The County must implement practices that satisfy Article 1.051(c)(1)'s timeline.

**FINDING 6 (MISDEMEANOR CASES):** Parker County's misdemeanor appointment process did not meet TIDC's threshold for timely appointment of counsel (90% timely). Under Article 1.051(c)(2), statutory county courts must rule on all requests for counsel within three working days. The County must implement practices that satisfy Article 1.051(c)(1)'s timeline.

**FINDING 7 (MISDEMEANOR CASES):** The absence of a ruling on a pending request raises the possibility of several statutory violations, including untimeliness (Art. 1.051(c)) and invalid waiver of counsel (Art. 1.051(f-2)). Parker County must ensure that its procedures for ruling on counsel requests meet the requirements of both Article 1.051(c) and 1.051(f-2).

## **REQUIREMENT 5: INSTITUTE A FAIR, NEUTRAL, AND NONDISCRIMINATORY ATTORNEY SELECTION PROCESS**

Article 26.04(b)(6) of the Code of Criminal Procedure requires that local procedures for appointing counsel ensure appointments are allocated among qualified attorneys in a fair, neutral, and nondiscriminatory manner.

In assigned counsel systems, TIDC presumes a jurisdiction has a fair, neutral, and nondiscriminatory appointment system if the top 10% of attorneys receiving cases at a given level receive no more than three times their respective share of appointments.<sup>29</sup> If a county can track appointments by list, this analysis is made according to each appointment list. A county can overcome the presumption by providing evidence as to why the system is fair, neutral, and nondiscriminatory.

### ***Assessment***

TIDC examined the distribution of cases paid to attorneys on the felony, misdemeanor, and juvenile appointment lists (see Table 6). The distributions fell well within TIDC's presumed threshold. TIDC finds Parker County is in substantial compliance with Requirement 5.

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<sup>29</sup> 1 TEX. ADMIN. CODE § 174.28(c)(5)(D).

**Table 6: Share of Cases Paid to Top 10% of Attorneys**

Level	Attorneys on List <sup>30</sup>	Top 10% Attorneys <sup>31</sup>	Respective Share of Cases <sup>32</sup> [Column A]	Actual Share of Cases [Column B]	Top 10% Received 'x' Times Their Respective Share [Col. B] / [ Col. A]
Felony	41	4	9.8%	16.7%	<b>1.7</b>
Misdemeanor	33	3	9.1%	21.2%	<b>2.3</b>
Juvenile	17	2	11.8%	28.6%	<b>2.4</b>

**FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 5**

**Attorney Selection Process**

Requirement satisfied. No findings.

**REQUIREMENT 6: REPORT DATA REQUIRED BY STATUTE**

Under Section 79.036(e) of the Texas Government Code, the county auditor (or other person designated by the commissioners' court) must annually prepare and send indigent defense data to the Commission. This data must include the total expenses for cases in which an attorney was appointed for an indigent defendant or indigent juvenile in each district court, county court, statutory county court, and appellate court. Since FY2014, financial data reports must include attorney-level information. Data reported by the County Auditor is consistent with summary case file data examined by TIDC.

**FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 6**

**Statutory Data Reporting**

Requirement satisfied. No findings.

**Conclusion**

TIDC thanks Parker County officials and staff for their assistance in completing this review. TIDC will conduct a follow-up review regarding its noncompliance finding within two years.<sup>33</sup> TIDC staff stand ready to provide technical and financial assistance to ensure full compliance with the Fair Defense Act.

<sup>30</sup> TIDC considered an attorney to be on the appointment list if the attorney was on any court lists for the offense level.

<sup>31</sup> The number Top 10% Attorneys is equal to the number of Attorneys on List for Entire Year multiplied by 0.10, rounded to the nearest whole number.

<sup>32</sup> The percent Respective Share of Cases is equal to the number of Top 10% Attorneys divided by the number of Attorneys on List for Entire Year.

<sup>33</sup> 1 TEX. ADMIN. CODE § 174.28(c)(2).

## **Summary of Findings and Recommendations**

Parker County must respond in writing how it will address the report's findings.

### **REQUIREMENT 1: CONDUCT PROMPT AND ACCURATE MAGISTRATION PROCEEDINGS.**

**FINDING 1:** Article 15.17(e) of the Code of Criminal Procedure requires the court to ask and record whether each defendant requests counsel, regardless of whether the defendant expects to make bail. Magistrates must ask each defendant charged with a jailable offense whether the person would like to request appointed counsel and record the response.

**FINDING 2:** At the Article 15.17 hearing, a magistrate must ensure the arrested person has reasonable assistance in completing the necessary forms for requesting counsel at the time of the hearing. The County must provide a method to ensure reasonable assistance in completing affidavits of indigence is provided at the time of the Article 15.17 hearing.

### **REQUIREMENT 3: MINIMUM ATTORNEY QUALIFICATIONS**

**FINDING 3 (FELONY AND JUVENILE CASES):** Article 26.04(d) of the Code of Criminal Procedure requires a majority of the judges who established the public appointment list to approve attorneys for the list. The district courts must establish felony and juvenile public appointment lists in which each attorney is approved by a majority of the judges.

**FINDING 4 (MISDEMEANOR CASES):** Article 26.04(d) of the Code of Criminal Procedure requires a majority of the judges who established the public appointment list to approve attorneys for the list. The statutory county courts must establish a misdemeanor appointment list in which each attorney is approved by a majority of the judges.

### **REQUIREMENT 4: APPOINT COUNSEL PROMPTLY.**

**FINDING 5 (FELONY CASES):** Parker County's felony appointment process did not meet TIDC's threshold for timely appointment of counsel (90% timely). Under Article 1.051(c)(2), district courts must rule on all requests for counsel within three working days. The County must implement practices that satisfy Article 1.051(c)(1)'s timeline.

**FINDING 6 (MISDEMEANOR CASES):** Parker County's misdemeanor appointment process did not meet TIDC's threshold for timely appointment of counsel (90% timely). Under Article 1.051(c)(2), statutory county courts must rule on all requests for counsel within three working days. The County must implement practices that satisfy Article 1.051(c)(1)'s timeline.

**FINDING 7 (MISDEMEANOR CASES):** The absence of a ruling on a pending request raises the possibility of several statutory violations, including untimeliness (Art. 1.051(c)) and invalid waiver of counsel (Art. 1.051(f-2)). Parker County must ensure that its procedures for ruling on counsel requests meet the requirements of both Article 1.051(c) and 1.051(f-2).

## Appendix: Monitoring Review Checklist

The monitoring review of the FDA's core requirements consisted of an examination of the items from the following checklist. If a box is marked, the specific requirement was met. If a box is not marked, the requirement either was not satisfied or is not applicable.

### REQUIREMENT 1: CONDUCT PROMPT AND ACCURATE ARTICLE 15.17 PROCEEDINGS

- The accused must be brought before a magistrate within 48 hours of arrest.<sup>34</sup>
  - A person arrested for a misdemeanor without a warrant must be released on bond in an amount no more than \$5,000 not later than 24 hours after arrest if a magistrate has not determined probable cause by that time.<sup>35</sup>
- The magistrate must inform and explain the right to counsel and the right to appointed counsel to the accused.<sup>36</sup>
- The magistrate must ensure that reasonable assistance in completing forms necessary to request counsel is provided to the accused.<sup>37</sup>
- A record must be made of the following:
  - the magistrate informing the accused of the accused's right to request appointment of counsel;
  - the magistrate asking whether accused wants to request appointment of counsel;
  - and whether the person requested court appointed counsel.<sup>38</sup>
- If authorized to appoint counsel, the magistrate must do so within one working day after receipt of request for counsel in counties with a population of 250,000 or more and within three working days in counties under 250,000.<sup>39</sup>
- If not authorized to appoint counsel, the magistrate must transmit or cause to be transmitted to the appointing authority an accused's request for counsel within 24 hours of the request being made.<sup>40</sup>

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<sup>34</sup> TEX. CODE CRIM. PROC. ART. 14.06(a).

<sup>35</sup> TEX. CODE CRIM. PROC. ART. 17.033.

<sup>36</sup> TEX. CODE CRIM. PROC. ART. 15.17(a).

<sup>37</sup> *Id.* This box is not checked because affidavits are not always completed at the time defendants request counsel.

<sup>38</sup> TEX. CODE CRIM. PROC. ART. 15.17(e). This box is not checked because defendants who are likely to make bail are not asked if they want to request counsel.

<sup>39</sup> *See, e.g.*, TEX. CODE CRIM. PROC. ART. 15.17(a) (requiring magistrate to appoint counsel according to the timeframes set in TEX. CODE CRIM. PROC. ART. 1.051); TEX. CODE CRIM. PROC. ART. 1.051(c) (spelling out timeframe for appointment of counsel by county population size).

<sup>40</sup> TEX. CODE CRIM. PROC. ART. 15.17(a).

**REQUIREMENT 2: DETERMINE INDIGENCE ACCORDING TO STANDARDS DIRECTED BY THE INDIGENT DEFENSE PLAN.**

- Provide detailed procedures used to determine whether a defendant is indigent.<sup>41</sup>
- State the financial standard(s) to determine whether a defendant is indigent.<sup>42</sup>
- List factors the court will consider when determining whether a defendant is indigent.<sup>43</sup>

**REQUIREMENT 3: ESTABLISH MINIMUM ATTORNEY QUALIFICATIONS.**

- Establish objective qualification standards for attorneys to be on an appointment list.<sup>44</sup>
  - Standards must require attorneys to complete at least six hours of continuing legal education pertaining to criminal / juvenile law during each 12-month reporting period or be currently certified in criminal law by the Texas Board of Legal Specialization.<sup>45</sup>
  - Standards must require attorneys to submit by October 15 each year the percentage of the attorney's practice time dedicated to indigent defense based on criminal and juvenile appointments accepted in this county. The report must be made on a form prescribed by the Texas Indigent Defense Commission for the prior 12 months that begins on October 1 and ends on September 30.<sup>46</sup>

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<sup>41</sup> TEX. CODE CRIM. PROC. ART. 26.04(l)–(r).

<sup>42</sup> TEX. CODE CRIM. PROC. ART. 26.04(l).

<sup>43</sup> TEX. CODE CRIM. PROC. ART. 26.04(m).

<sup>44</sup> TEX. CODE CRIM. PROC. ART. 26.04(d). This box is not checked because each court uses its own list rather than a countywide public appointment list. However, the courts are tracking that attorneys meet their list requirements.

<sup>45</sup> 1 TEX. ADMIN. CODE § 174.1–.4.

<sup>46</sup> TEX. CODE CRIM. PROC. ART. 26.04(j)(4).

**REQUIREMENT 4: APPOINT COUNSEL PROMPTLY (JUVENILES).**

- ☒ Unless the court finds that the appointment of counsel is not feasible due to exigent circumstances, the court shall appoint counsel within a reasonable time before the first detention hearing is held to represent the child at that hearing.<sup>47</sup>
- ☒ If the child was not detained, an attorney must be appointed on or before the fifth working day after the date the petition for adjudication, motion to modify, or discretionary transfer hearing was served on the child.<sup>48</sup>

**REQUIREMENT 4: APPOINT COUNSEL PROMPTLY (ADULTS).**

- ☒ Incarcerated persons: After receipt of a request for counsel, counsel must be appointed within one working day in counties with a population of 250,000 or more and within three working days in counties under 250,000.<sup>49</sup>
- ☐ Persons out of custody: Counsel must be appointed at the defendant’s first court appearance or when adversarial judicial proceedings are initiated, whichever comes first.<sup>50</sup>
- ☐ All unrepresented defendants must be advised of the right to counsel and the procedures for obtaining counsel.<sup>51</sup>

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<sup>47</sup> TEX. FAM. CODE § 54.01(b-1). TEX. FAM. CODE § 51.10(c).

<sup>48</sup> TEX. FAM. CODE § 51.101(d).

<sup>49</sup> TEX. CODE CRIM. PROC. ART. 1.051(c).

<sup>50</sup> TEX. CODE CRIM. PROC. ART. 1.051(j); *see also Rothgery v. Gillespie Cnty.*, 554 U.S. 191, 212 – 13 (2008) (holding that “a criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel.”). This box is not checked because defendants who make bail do not have their requests promptly ruled upon.

<sup>51</sup> TEX. CODE CRIM. PROC. ART. 1.051(f-2). This box is not checked because some misdemeanor defendants requested counsel but entered uncounseled pleas before their requests were ruled upon.

**REQUIREMENT 5: INSTITUTE A FAIR, NEUTRAL, AND NONDISCRIMINATORY ATTORNEY SELECTION PROCESS.**

- ☒ Rotational method: The court must appoint an attorney from among the next five names on the appointment list in the order in which the attorneys' names appear on the list, unless the court makes a finding of good cause on the record for appointing an attorney out of order.<sup>52</sup>
- ☐ Public Defender: The system must meet the requirements set out in Article 26.044 of the Code of Criminal Procedure. The appointment process must be listed in the indigent defense plan.<sup>53</sup>

**NOT APPLICABLE:** The County does not have a public defender.

- ☐ Alternative appointment method:<sup>54</sup>
  - The local processes must be established by a vote of two-thirds of the judges.
  - The plan must be approved by the presiding judge of the administrative judicial region.
  - The courts must allocate appointments reasonably and impartially among qualified attorneys.

**NOT APPLICABLE:** The County does not operate an alternative appointment program.

**REQUIREMENT 6: REPORT DATA REQUIRED BY STATUTE**

- ☒ The county auditor shall prepare and send to OCA an annual report of legal services provided in the county to indigent defendants during the fiscal year and an analysis of the amount expended:
  - The local processes must be established by a vote of two-thirds of the judges.
  - The plan must be approved by the presiding judge of the administrative judicial region.
  - The courts must allocate appointments reasonably and impartially among qualified attorneys.<sup>55</sup>

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<sup>52</sup> TEX. CODE CRIM. PROC. ART. 26.04(a).

<sup>53</sup> TEX. CODE CRIM. PROC. ART. 26.044.

<sup>54</sup> TEX. CODE CRIM. PROC. ART. 26.04(g)–(h).

<sup>55</sup> TEX. GOV'T CODE § 79.036(e).